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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 IN RE: Bard IVC Filters Products Liability
10 Litigation,
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No. MDL 15-02641-PHX-DGC

12 Sherr-Una Booker, an individual,
13 Plaintiff,

No. CV-16-00474-PHX-DGC

14 v.

15 C. R. Bard, Inc., a New Jersey corporation;
16 and Bard Peripheral Vascular, Inc., an
17 Arizona corporation,
18 Defendants.
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ORDER

20 Near the close of trial last week, Plaintiff objected to Defendants presenting
21 evidence of complications associated with Bard's Simon Nitinol Filter ("SNF"). In
22 addition to arguments made in court, the parties have filed memoranda addressing the
23 issue. Docs. 10487, 10488.¹

24 In seeking to prove her claim that Defendants defectively designed the G2 filter
25 and failed to warn about its risks, Plaintiff has claimed during trial that the G2, and its
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27 ¹ Each party also provided the Court with a USB flash drive containing SNF-
28 related documents. Defendants' documents consist of medical literature about SNF
complications, expert reports citing some of those articles, and documents produced to
Plaintiff during discovery. Plaintiff's documents consist largely of internal Bard
communications about the safety and effectiveness of the SNF.

1 predicate device, the Recovery filter, were considerably less safe than the SNF.
2 Defendants intend to rebut this evidence by presenting medical literature about SNF
3 failure rates and expert testimony that failures with the SNF, as a permanent filter, are
4 reported less frequently than failures for retrievable filters.

5 Plaintiff claims that Defendants should be prevented from presenting this evidence
6 because she was barred from conducting relevant discovery, citing Case Management
7 Order No. 10 (“CMO 10”). *See* Doc. 1319. Defendants argue that Plaintiff’s reliance on
8 CMO 10 is misplaced because the order afforded Plaintiff significant discovery
9 concerning the SNF, all of Bard’s adverse event data concerning the SNF were produced,
10 and the only materials not produced were SNF design and testing documents.
11 Doc. 10487 at 2.

12 Plaintiff sought production of six categories of documents related to the SNF:
13 (1) design materials, (2) testing information, (3) regulatory communications, (4) sales and
14 marketing materials, (5) information comparing the SNF to other filters, and (6) internal
15 Bard communications related to these subjects. Doc. 1161 at 1-2. The Court permitted
16 discovery regarding topics (4), (5), and (6), and Defendants agreed to produce the
17 documents on topic (3). Doc. 1319 at 4-5. The only discovery not allowed by CMO 10
18 was on topics (1) and (2) – the design and testing of the SNF. The Court foreclosed this
19 discovery because Plaintiff did not contend then, and does not contend now, that the SNF
20 is defective.

21 Plaintiff argues that discovery regarding the design and testing of the SNF would
22 somehow have permitted her to challenge Bard’s assertion that the SNF has had as many
23 failures as the Recovery and G2. Doc. 1048 at 2. But Plaintiff was not precluded from
24 conducting discovery of SNF failures. CMO 10 specifically permitted Plaintiff to obtain
25 “documents comparing filter performance and failure rates to the SNF.” Doc. 1319 at 4.
26 True, Plaintiff was precluded from conducting discovery into the design and testing of the
27 SNF, but that was because she does not claim that the SNF was designed defectively.
28 Rather, she asserts that the SNF is a markedly safer filter than the Recovery and G2. The

1 Court cannot see, and Plaintiff does not explain, how discovery into the design and
2 testing of the SNF would have produced any information on failure rates the SNF
3 experienced after it was on the market.

4 Plaintiff argues that the SNF received design changes through 1995 and that she
5 will be unable to contradict the medical literature Defendants intend to present because
6 those articles depend on the precise version of the SNF filter at issue. But Plaintiff never
7 made this argument in connection with CMO 10, and, in arguing that the SNF is a safe
8 and effective filter, Plaintiff has never distinguished between different versions.

9 Nor has Plaintiff shown that she will be unable to rebut the medical literature
10 Defendants intend to present. To the contrary, Plaintiff has identified multiple internal
11 Bard documents showing that failure rates for the SNF were much lower than Recovery
12 and G2 rates. This information was produced by Defendants during discovery. Plaintiff
13 has already presented much of it during trial, will present more, and will be free to cross-
14 examine witnesses with this evidence.

15 Plaintiff may make appropriate evidentiary objections to any evidence Defendants
16 seek to present, but the Court will not preclude Defendants from presenting their SNF
17 evidence on the basis of a discovery ruling. The Court does not agree that Plaintiff was
18 foreclosed from obtaining relevant evidence for rebuttal.

19 Dated this 19th day of March, 2018.

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23 David G. Campbell
24 United States District Judge
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